STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2011
v	No. 295724 Genesee Circuit Court
JIMMY RAY LACY, JR., Defendant-Appellant.	LC No. 08-023410-FC

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 35 to 70 years for the murder conviction and three to five years for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

According to the evidence at trial, defendant and the victim became involved in an argument as the victim was attempting to purchase drugs from defendant. While the victim was returning to his vehicle, defendant shot him three times in his back. The principal evidence against defendant was the testimony of the victim's brother, Aaron Williams, who testified that he was present at the time of the shooting and saw defendant shoot the victim. Another witness, Terrence Smith, who was defendant's neighbor and friend, testified that defendant shot the victim in self-defense. Reginald Davidson testified that while in the county jail with defendant, defendant confessed that he shot the victim. Defendant's brother and girlfriend presented alibi testimony on defendant's behalf.

I. RIGHT TO A PUBLIC TRIAL

Defendant first argues that his right to a public trial was violated when the trial court closed the courtroom to the public during jury selection.

A criminal defendant has a constitutional right to a public trial, US Const, Am VI; Const 1963, art 1, § 20, and that right extends to jury selection. *Presley v Georgia*, 558 US ___; 130 S Ct 721, 725; 175 L Ed 2d 675, 681 (2010). However, a defendant may relinquish his right to a

public trial by failing to object to the trial court's decision to close the courtroom to the public during jury selection. *Levine v United States*, 362 US 610, 619; 80 S Ct 1038; 4 L Ed 2d 989 (1960); *United States v Hitt*, 473 F3d 146, 155 (CA 5, 2006). The trial court stated just prior to jury selection that it was closing the courtroom because there was insufficient room for the audience and the potential jurors, and it would be improper for potential jurors to mingle with anyone interested in the outcome of the case. Defendant did not object to the closure at that time, so any relief now is foreclosed. *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 6-7.

II. RIGHT OF CONFRONTATION

Defendant argues that he was denied his right of confrontation under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), by the admission of the victim's statements indicating his desire to purchase drugs from defendant. We disagree because the statements were not testimonial. The right of confrontation applies to "'witnesses'" who give "'testimony,'" meaning "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id*. at 51 (internal citations omitted).

Smith testified that "[t]hey was asking [defendant] for the soft form of crack cocaine, but he did not sell that and that's what the argument was over," and Williams's testified that the reason for going to defendant's house was that "[his] brother was going to buy some crack." These out-of-court statements were made informally to acquaintances, not during a police interrogation or other formal proceeding, and the circumstances do not indicate that the "primary purpose" was to "establish or prove past events potentially relevant to later criminal prosecution." See *People v Taylor*, 482 Mich 368, 377-378; 759 NW2d 361 (2008), see also *People v Bauder*, 269 Mich App 174, 180-181; 712 NW2d 506 (2005) (statements made by a complainant to friends, coworkers, and a defendant's relatives were not testimonial). Because the statements referenced by Williams and Smith were not testimonial, there was no violation of defendant's right to confrontation.

III. FLIGHT

Defendant argues that the trial court erred in admitting evidence of flight, by instructing the jury that it could consider evidence of flight, and by giving a flight instruction that did not include defendant's alibi theory to rebut the prosecution's flight theory. We disagree. Because defendant did not object to either the challenged flight evidence or the trial court's jury instruction on flight, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Evidence of flight, like fleeing the scene or running from the police, is admissible, and although it cannot sustain a conviction by itself, it is probative because it may show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). After the shooting, defendant left the area on foot and, rather than returning home, which was being surveilled by the police, stayed at a hotel instead and asked Smith to feed the dogs at his house. This supports an inference that he was trying to avoid detection, and his alleged attendance at a barbeque the day after the shooting does not negate this inference. Furthermore, there was additional evidence of defendant's guilt in the form of eyewitness testimony. The evidence of

flight was properly admitted. Therefore, the trial court did not err in instructing the jury on flight. The trial court's flight instruction was modeled after CJI2d 4.4 and accurately stated the law regarding flight. See *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992). The trial court separately instructed the jury on defendant's alibi, and it properly explained that the prosecutor had to prove beyond a reasonable doubt that defendant was actually at the crime scene when the crime was committed. There was no instructional error.

IV. ADMISSION OF OTHER ACTS

Defendant argues that his convictions must be reversed because the trial court improperly admitted other acts evidence, contrary to MRE 404(b), and gave an improper limiting instruction. We disagree. Defendant objected to testimony that the victim was at his home to purchase drugs and that he made threats against witness Davidson, he did not object to a witness's reference to dog fighting or to the trial court's limiting instruction. We review defendant's unpreserved claims for plain error affecting his substantial rights, *Carines*, 460 Mich at 752-753, 763-764, and his preserved claims for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Evidence of other acts is not inadmissible under MRE 404(b) if it is intended to give the jury an intelligible presentation of the complete context within which the disputed events occurred or if those acts are inextricably intertwined with the disputed events. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). There was evidence was that the victim had gone to defendant's house to purchase cocaine earlier in the day only to find that defendant did not have the "soft" kind of cocaine that the victim wanted. The victim later returned to defendant's residence and was heard loudly insisting on purchasing "soft" cocaine, and he was then shot and killed. This evidence helped tell the "complete story" of the entire incident, including the victim's relationship to defendant, why the victim was present, and why they had a dispute. This evidence was admissible as part of the res gestae of the charged offense, independent of MRE 404(b).

Defendant also argues that the prosecutor was improperly allowed to elicit evidence of defendant's involvement in dog fighting during direct examination of Smith:

> *Q.* Where did this [altercation] take place at exactly? Was it outside or inside 121?
>
> *A.* Outside.
>
> * * *
>
> *Q.* Okay. Where in the driveway did this altercation start?
>
> *A. Basically right there where the dogs fight at.*
>
> *Q.* Can you just repeat that?

The court: Where the shadow of the driveway is. Right in there.

Q. In this area, sir?

A. Yes, sir. [Emphasis added.]

Smith's reference to dog fighting was clearly not intentionally introduced by the prosecution. Rather, the reference was part of an unsolicited answer to an open-ended question designed to elicit the exact location of the altercation between defendant and the victim, and to access Smith's vantage point. Even though defendant did not object to the dog fighting reference, the trial court intervened and redirected the witness to identify the precise location. We find the dog-fighting reference sufficiently isolated, brief, and vague that there is no reasonable probability that it affected defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

Defendant next argues that the trial court abused its discretion by allowing evidence that he threatened to kill Davidson and his mother if Davidson testified against him. A defendant's threat against a witness is generally admissible because it is conduct that can demonstrate consciousness of guilt. *Sholl*, 453 Mich at 740. Davidson's testimony that he received death threats directly from defendant while they were in jail together was sufficient to establish the requisite connection between defendant and the threats. See *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). Defendant's attempt to prevent Davidson from testifying was relevant to show his consciousness of guilt. *Sholl*, 453 Mich at 740.

Defendant contends that evidence of the threat should have been excluded under MRE 403 because it was unduly prejudicial. But MRE 403 is not intended to exclude "damaging" evidence, as any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Instead, it "is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* (emphasis in the original). Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Defendant has not demonstrated that he was unfairly prejudiced by the properly admitted evidence. The prosecutor focused on the proper purpose for which the evidence was admissible. Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the evidence, thereby limiting the potential for unfair prejudice. The trial court properly admitted evidence of defendant's threat against Davidson.

We also disagree with defendant's claim that the trial court should have crafted an instruction that specified how the jury could consider each act. A "defendant is entitled to a carefully crafted limiting instruction advising the jurors that they are to consider the other acts evidence only as indicative of the reasons for which the evidence is proffered to cushion any prejudicial effect flowing from the evidence." *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). A limiting instruction generally "suffice[s] to enable the jury to compartmentalize evidence and consider it only for its proper purpose . . . ." *People v Crawford*, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998). Here, the trial court gave an instruction based

on CJI2d 4.11, the standard limiting instruction for other acts evidence, and correctly instructed the jury to consider the other acts evidence only for noncharacter purposes. Under the circumstances here, where defendant made no specific request for an instruction tailored to any specific circumstances, there was no plain error in giving the standard instruction.

V. PROSECUTOR'S CONDUCT

Defendant argues that the prosecutor's conduct during trial denied him a fair trial. We disagree. Because defendant did not object to the challenged questions and comments below, this issue is unpreserved and we review the issue for plain error affecting substantial rights. *Carines*, 460 Mich at 752-753, 763-764. This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor mischaracterized the evidence by stating that defendant fled the scene and engaged in misconduct by eliciting testimony that defendant engaged in dog fighting. We disagree. As discussed, the evidence of defendant's flight was properly admitted, so the prosecutor was free to refer to it. And the single reference to dog fighting was an unsolicited response to a proper question not calculated to elicit it, and there is no indication that the prosecutor's questioning was done in bad faith.

Defendant also argues that the prosecutor improperly vouched for the testimony of Smith and Williams through the following emphasized remarks during closing argument:

> Now, you heard testimony from Aaron Williams. That's the brother of the victim. What is his motivation to lie in this case? He doesn't have any motivation . . . .
>
> Aaron Williams testified specifically about why they went to 121 West Eldrige, and *wouldn't it be hard to admit that you're going somewhere to buy drugs? Yes, of course it's hard to admit that. Was he reluctant before to testify to that? I'm sure he was.*
>
> * * *
>
> But even without Reginald Davidson's testimony, even without his testimony, even without the defendant's confession that he shot [the victim], we have the testimony of the other witnesses, and really *one of the most credible witnesses would be Terrance Smith.* He places the gun in the defendant's hand, but he also tries to set up a self-defense. So, even without the confession, we have other witnesses identifying the defendant Jimmy Ray Lacy as the shooter. [Emphasis added.]

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that the witnesses were credible. The prosecutor's argument was a proper response to the defense implication and assertions during trial that the

eyewitnesses were not credible. Further, even though defendant did not object, the trial court instructed the jurors that they were the sole judges of witness credibility, and that the lawyers' statements and arguments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

VI. REQUESTED JURY INSTRUCTIONS

Defendant argues that the trial court erred by denying his requests for an addict-informant instruction pursuant to CJI2d 5.7 and for a special instruction on eyewitness identification pursuant to *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled in part by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). We disagree. A trial court's decision whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

An addict-informer instruction is appropriate when the uncorroborated testimony of an addict is the only evidence linking the accused with the alleged offense. *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994); see also the use notes for CJI2d 5.7. Williams had consumed alcohol on the day of the offense and gave damaging testimony against defendant, but there is no evidence he was an "addict" and "informant" as contemplated by CJI2d 5.7. Moreover, his testimony was not the only evidence linking defendant to the crime. Therefore, the trial court did not err by failing to give an addict-informer instruction.

The trial court also properly declined defendant's request to take judicial notice of and to provide a special jury instruction on the inherent unreliability of eyewitness identifications. See *Anderson*, 389 Mich at 155. "*Anderson* does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). The *Anderson* principles are adequately presented to a jury in the context of CJI2d 7.8, which appears to have been "drafted to reflect the *Anderson* opinion." *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996), readopted in pertinent part by a special panel in *People v Carson*, 220 Mich App 662, 678 (1996). The trial court not only gave CJI2d 7.8 to the jury, it also gave other instructions independently advising the jury of the uncertainties of eyewitness identification and the need to consider it with care. The instructions were sufficient to protect defendant's rights, the trial court did not abuse its discretion by refusing to give defendant's requested special eyewitness instruction.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at trial in numerous ways. Again, we disagree. Because defendant failed to raise an ineffective assistance of counsel claim in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness and that it is "reasonably probable that the results

of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

First, trial counsel cannot be ineffective for failing to make a futile objection. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, there is no merit to defendant's claims that trial counsel should have objected to the trial court's flight instruction or to the prosecutor's alleged vouching during closing argument. As discussed, the trial court properly instructed the jury and the prosecutor's remarks were not improper.

Defendant argues that trial counsel should have requested appointment of an expert on eyewitness identification. The trial court may appoint an expert witness for an indigent defendant upon request, but the defendant must show that the expert's testimony is required to enable the defendant to "safely proceed to a trial." MCL 775.15; *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). Trial counsel was able to show that Williams had consumed a large amount of alcohol on the evening of the shooting, and counsel otherwise elicited a number of arguable bases for challenging the accuracy of the identifications. Defendant has not shown that he was prejudiced by the absence of an expert or that counsel was ineffective for failing to request one.

Defendant finally argues that defense counsel was ineffective for failing to object to the other acts evidence discussed *supra*. However, the only such act that went unchallenged was the reference to dog fighting. In context, it would have been sound trial strategy to avoid bringing further attention to the brief, isolated, and vague reference by raising an objection. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Also, given the evidence connecting defendant to the crime, it is not reasonably probable that defense counsel's failure to object affected the outcome of the trial. *Frazier*, 478 Mich at 243.

VIII. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to sustain his conviction of second-degree murder. Defendant specifically argues that there was no evidence that he acted with malice. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice, which includes "the intent to kill," *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted), may be inferred from facts in evidence, including the use of a dangerous weapon, the injuries inflicted, and the defendant's conduct. See *Mills*, 450 Mich at 71, *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), and *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Here, when the evidence is

viewed in the light most favorable to the prosecution, it shows that defendant shot the victim three times in the back while the victim was walking away, striking the victim in the neck, lower back, and leg. This evidence is sufficient for a rational trier of fact to reasonably infer beyond a reasonable doubt that defendant possessed the required intent to kill for second-degree murder.

IX. CUMULATIVE EFFECT OF SEVERAL ERRORS

We reject defendant's last argument that the cumulative effect of several minor errors denied him a fair trial. Because no cognizable errors have been identified, there is no cumulative effect of multiple errors that denied him a fair trial. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause